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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

MELANIE SEGUINE et al.,

Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants and Respondents.

A100562

(San Francisco County
Super. Ct. No. 316999)

Plaintiffs Melanie Seguire and Robert Amundson appeal the entry of summary judgment in favor of defendants City and County of San Francisco (City) and James Adams, on their complaint for wrongful death. Plaintiffs claim that Adams, a San Francisco police officer, negligently failed to meet their sister Barbara Amundson at the site of a suspected burglary as promised, and that the defendants therefore are liable for her death which resulted when she entered the building alone and encountered a burglar. We conclude that under the undisputed circumstances, the defendants did not owe Barbara a duty of care because she did not rely to her detriment on the police department's promise to send an officer to meet her. Accordingly, we affirm.

Factual and Procedural Background

The following facts are undisputed. Security Link, a private security firm, called the San Francisco Police Department four different times between approximately 11:00 p.m. on Saturday, December 11, 1999, and 5:30 a.m. Sunday, December 12, 1999, with regard to an alarm that had been triggered at the Major Lines warehouse on Bayshore Boulevard in San Francisco. In response to each of these calls, police officers were

dispatched to the warehouse to investigate. Each time the officers reported that the premises appeared safe from the exterior.

The alarm was triggered a fifth time at approximately 7:30 a.m. Sunday morning. In response, a representative of SecurityLink called Barbara Amundson, a manager at Major Lines whose name appeared on the company's alarm notification list. The following conversation ensued:

"BARBARA: [The police] haven't found anything yet?

"SECURITY LINK: No, they have not. They haven't found anything.

"BARBARA: Maybe I'll have them wait, and if I see anything I'll have them go in with me I don't want to go in the building by myself...alright?

"

"BARBARA: It's a full city block and it's a warehouse. I mean...I don't want to walk in and have, you know somebody hiding... .

" . . . [¶] . . . [¶] . . .

"BARBARA: It's a warehouse with offices. But like if somebody's come...you know there's windows in the back of the warehouse. If somebody's been breaking through the windows... . [¶] . . . and climbing through. That could put a motion detector off.

"SECURITY LINK: . . . But every two hours... . You think they are going back and forth and back and forth?

"BARBARA: Uh...we had that once before... .

" . . . [¶] . . .

"SECURITY LINK: If you want I can call the police...I'm gonna have the dispatcher call the police and... [¶] . . . if you give me a time . . . to meet you out there... or . . . you want them to meet you out there to check the alarm system out, and I'll call you back to tell you if they can meet you and when they can meet you.

"BARBARA: OK. ...I don't mind doing it so much when it's light. I don't like doing it when it's dark, but ... it'll take me about half an hour to get there." (Ellipses without spacing in original.)

The Security Link representative then confirmed with Barbara when she would be at the warehouse and the type of car she would be driving, and reiterated that he would call the police and call her back with their response.

At 7:33 a.m., SecurityLink called the San Francisco Police Department to notify it of the fifth alarm. At that time, the caller told the police dispatcher that he had already called Barbara and that “she wanted the PD to meet her out there in 30 minutes.” The dispatcher agreed to send an officer to meet Barbara. A minute later, the police dispatcher used the radio to dispatch Officer Adams to investigate the alarm at the warehouse. In violation of the police department’s standard operation procedures, the dispatcher failed to advise Adams over the radio that Barbara wanted to meet him there. And, while this information was transmitted to the computer in Adams’s patrol car, Adams testified at his deposition that he did not read the notice prior to clearing the call screen on his computer.

At 7:42 a.m., Officer Adams arrived at the warehouse. He checked the front of the building by inspecting the lock on the door and shining his flashlight through the windows. He also checked the fence for signs that it was broken or cut. Then he went to the rear of the building and checked the back door and fence. His search took approximately three and a half minutes and thereafter he reported that the building appeared secure from the exterior. He was then dispatched on another call.

Barbara arrived at the warehouse and entered the building at 8:17 a.m. At that time she had not spoken with the police department or heard back from SecurityLink confirming her requested meeting with a police officer. Barbara encountered an intruder upon entering the building and died of cardiac arrest.

Subsequently plaintiffs filed a wrongful death action against the City, Officer Adams, and Security Link. The complaint alleges a single cause of action for negligence against the City and Adams. The defendants moved for summary judgment on the grounds that they did not owe Barbara a duty to protect her from this injury, that their conduct did not cause her injury, and that their conduct is immunized under Government Code sections 845, 820.2, and 815.2. The trial court granted defendants’ motion. The

court's tentative ruling was to grant the motion based on the duty issue, but its final order was based on the ground that the defendants were immune from suit under Government Code section 845. From the subsequent judgment, plaintiffs filed a timely notice of appeal.

Discussion

This court reviews de novo the trial court's grant of summary judgment to determine whether the defendants have conclusively negated a necessary element of plaintiffs' case. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.) The court may affirm the summary judgment "if it is correct on any legal theory applicable to this case, whether or not that theory was adopted by the trial court" (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 409.)

Although the parties begin their analysis with a discussion of statutory immunity, the California Supreme Court has admonished, " 'Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.' " (*Williams v. State of California* (1983) 34 Cal.3d 18, 22 (*Williams*), citing *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201-202.) Accordingly, we first consider whether plaintiffs have established that the police department owed Barbara a duty of care.

"The existence of a duty of care is a question of law to be determined by the court alone. [Citations.] This is because 'legal duties are . . . merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.' [Citation.] Duty is simply a shorthand expression for the sum total of policy considerations favoring a conclusion that the plaintiff is entitled to legal protection. [Citation.]" (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 265 (*Adams*).)

Duty of Care Analysis Under the Special Relationship Exception

The California Supreme Court recently reaffirmed the limitations placed on a police officer's duty to protect an individual from crime. "[T]he general rule is that

although the government may assume responsibility for providing adequate police protection against third party violence, this does not create a legal duty that normally will give rise to civil liability. In this and in other jurisdictions, it is well established that public entities generally are not liable for failing to protect individuals against crime.” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) In *Zelig*, the court reiterated the principle set forth in *Williams, supra*, that absent a special relationship between the police department or officer and an individual, the police department and its officers have no legal duty to protect that individual from injury by a third party. (*Zelig*, 27 Cal4th at p. 1129-1130.)

In *Williams, supra*, the court held that the following “rules concerning the duty—or lack thereof—to come to the aid of another are applicable to law enforcement personnel.” (34 Cal.3d at p. 24.) “As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. [Citations.] Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the ‘good Samaritan.’ He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” (*Id.* at p. 23.) In applying these principles, the court noted that “although ‘no special relationship may exist between members of the California Highway Patrol and the motoring public generally, or between the Patrol and stranded motorists generally’ [citation], when the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization.” (*Id.* at p. 24.) In *Lopez v. City of San Diego* (1987) 190 Cal.App.3d 678, 681, the court held, “Where the gravamen of the complaint is a police failure to act reasonably in protecting members of the public from the harm caused by a third person (i.e., nonfeasance), a series of recent Supreme Court cases make clear that

the liability of the governmental entity is narrowly circumscribed. [Citations.] Generally, there is no legal ‘duty,’ and hence no liability for negligence, unless there is a special relationship between the police and either the victim or the third person which gives rise to a responsibility to control the third person’s conduct. [Citations.] In the usual situations involving the performance of police duties, such a relationship has been held to depend on representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.” (See also *Adams, supra*, 68 Cal.App.4th at p. 280 [courts have imposed special duties on police officers only in limited circumstances such as where the police officers made misrepresentations that induced a citizen’s detrimental reliance, placed a citizen in harm’s way, or lulled a citizen into a false sense of security and then withdrew essential safety precautions]; *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 704 [“A special relationship between the police and an individual has been found in a few narrow circumstances”].)

Here, plaintiffs contend that the police department owed Barbara a special duty of care because the dispatcher promised that an officer would meet her at the warehouse but failed to do so. Plaintiffs further contend that Barbara entered the property in reliance on this promise believing that the officer had ensured the safety of the building before she arrived. While defendants quibble with plaintiffs’ assertion that the police promised to meet Barbara at the building, they raise a far more credible argument with respect to Barbara’s detrimental reliance on that asserted promise. Although Barbara expressed some concern about entering the building without police protection, it is clear from the undisputed facts that she did not rely on a promise of a police escort. Barbara had not heard back from SecurityLink confirming her request that an officer meet her, and she took no steps to determine whether an officer was coming. Instead, she entered the warehouse without waiting for the officer to arrive or confirming that he had already been there. This conduct is consistent with her own statement that she did not mind going into the building alone when it was light, which it was by the time she arrived.

Plaintiffs' assertion that Barbara must have assumed the officer had already checked the building when she entered does not alter this conclusion. Barbara knew that officers had previously checked the outside of the building that night and determined that despite the recurring alarms there did not appear to have been an entry. She also knew that the building was locked when she arrived, so that it was unlikely that the officer had searched the interior of the building. Thus, by entering the building without waiting for a police escort, she did so, at most, in reliance on the officer's exterior inspection of the building. Any inadequacy in that regard, however, would not support liability. An officer's response to an alarm and subsequent investigation does not give rise to a duty to protect a citizen from any harm the officer failed to uncover. (*Von Batsch v. American Dist. Telegraph Co.*, *supra*, 175 Cal.App.3d at p. 1124.) In *Von Batsch*, law enforcement officers responded to a burglar alarm at a business office. Although they investigated the alarm, they did not search the roof. Had they searched the roof, they would have discovered several holes cut by the burglars. After the officers left, the burglars killed an employee working in the building. The court held that "the allegations of the complaint fail[ed] to establish a duty of care owed by the officers . . . on the basis of reliance on a promise or on the officers' conduct in a dependency situation." (*Id.* at p. 1124.) "The complaint on its face shows no detrimental reliance by decedent in a situation of dependency on the officers' conduct or statement which worsened decedent's position. The alleged tort here is merely nonfeasance-failure to inspect the roof-despite [plaintiff's] attempt to characterize it as an affirmative act because they conducted an investigation and reported it. The officers did not create the peril to decedent. They took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed. At most they merely failed to eliminate the danger of unknown intruders." (*Ibid.*) Likewise, by responding to the alarm and conducting an external inspection of the building, no matter how limited, Adams did not create, increase or change the nature of the risk to Barbara. Accordingly, plaintiffs failed to establish a special relationship between defendants and Barbara.

Duty of Care Analysis Under Rowland Factors

Plaintiffs contend that as an alternative to the special relationship analysis this court should apply the “traditional” factors used to determine the existence of a duty of care set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108. These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability. (*Id.* at pp. 112-113.) Initially, we question whether, in light of the Supreme Court’s recent reaffirmation of the special relationship analysis in *Zelig, supra*, 27 Cal.4th 1112, lower courts may reweigh the *Rowland v. Christian* factors and impose a duty upon law enforcement agents not supported by what the Supreme Court has characterized as a special relationship. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450.) Where the plaintiff’s claim is based on the police department’s negligent failure to protect an individual from a third party, substantial case law has concluded that there is no liability absent a finding of a special relationship. (See *id.* at pp. 1129-1130; *Williams, supra*, 34 Cal.3d at pp. 23-24; *M.B. v. City of San Diego, supra*, 233 Cal.App.3d at pp. 704-705; *Von Batsch v. American Dist. Telegraph Co., supra*, 175 Cal.App.3d at p. 1124; *Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6, 10.) In any event, even a limited analysis under the *Rowland v. Christian* factors fails to suggest that this approach would produce a different result in this case.

First, the foreseeability that the dispatcher’s failure to orally advise the responding officer that Barbara had requested a police escort would result in Barbara entering the building alone, much less encountering a burglar and suffering a cardiac arrest, is attenuated at best. To the contrary, one would expect that if Barbara did not want to enter the building alone, she would have contacted the police or SecurityLink to ascertain the police officer’s whereabouts when she did not find an officer waiting for her at the warehouse. Moreover, the fact that the police had observed no signs of entry after

checking the series of recent alarms would seem to have suggested a malfunctioning of the alarm system rather than the presence of an intruder. Likewise, because there were no signs of an emergency compelling Barbara to enter the building before an officer arrived, but she nonetheless chose to do so, any potential causal relationship between the dispatcher's failure to follow dispatch protocol and the injury to Barbara was remote. Finally, there is no reason to ascribe any moral blame to the dispatcher or to Officer Adams. Moral blame requires not merely negligence, but a "higher degree of moral culpability such as where the defendant (1) intended or planned the harmful result [citation] (2) had actual or constructive knowledge of the harmful consequences of their behavior [citation] (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citations]." (*Adams, supra*, 68 Cal.App.4th at p. 270.) There is no evidence that either defendant acted with such culpability.

For these reasons, *Ma v. City and County of San Francisco* (2002) 95 Cal.App.4th 488 (*Ma*) provides far less support for plaintiffs' position than their argument suggests. In *Ma*, the court held that when 911 was called to request assistance for an individual experiencing breathing problems, the City and County of San Francisco had a duty to dispatch an ambulance in accordance with the emergency medical system's guidelines. (*Id.* at pp. 492, 495-496.) The court applied the *Rowland v. Christian* factors, finding among other things that it was highly foreseeable that injury would result if dispatch guidelines were not followed when assistance was requested for a person experiencing shortness of breath; that the degree of certainty of injury to the victim was "absolute" and the causal relationship between the failure to follow the guidelines was temporal and strong; and that the dispatcher and the City exhibited "an indifference that is intolerable in the important life and death context in which this critical public service is rendered." (95 Cal.App.4th at pp. 505-507.)¹

¹ Moreover, because *Ma* involved the duty imposed to respond to a call for emergency medical assistance, it did not consider the effect of an intervening third party criminal

Accordingly, neither Adams nor the police department owed Barbara a duty of care under the circumstances of this case. Summary judgment therefore was properly granted in favor of the defendants. In view of this determination, we need not consider the plaintiffs' additional arguments with respect to immunity and causation.

Disposition

The judgment is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Parrilli, J.

element, which is an important factor explaining the special relationship analysis that has developed to define the duty imposed on law enforcement agents.